from liability for negligence being ineffectual. *Pilson* v. *Tip-Top Auto Co.* (Ore. 1913) 136 Pac. 642.

In reaching a decision, the court seems to have lost sight of the distinction between a common carrier and an ordinary bailee for hire. There is no doubt that a provision in a contract, attempting to relieve a common carrier from liability for its negligence is invalid: *Rd. Co.* v. *Lockwood,* 17 Wall. 357; *Pittsburg, etc. Ry Co.* v. *Higgs,* 165 Ind. 694, 76 N. E. 299, 4 L. R. A. (N. S.) 1081. But, as a general rule, an ordinary bailee for hire can make a valid contract, excusing it from any liability, except that caused by its own gross negligence or fraud: *Gashweiler* v. *Wabash, etc. R. Co.,* 83 Mo. 112, 53 Am. Rep. 558; *Alexander* v. *Greene,* 3 Hill 9; *Wells* v. *Steam Nav. Co.,* 2 N. Y. 204; *Coffield* v. *Harris,* 2 Wilson (Tex.) sec. 315. The reason for the distinction is that the ordinary bailee, unlike the common carrier, is as fully at liberty to refuse employment as is a day laborer, and may, like him, settle the terms upon which his services shall be rendered, with the exception above noted. The instant case cites a number of authorities in support of the proposition advanced, but all except *Lancaster Co. Nat. Bk.* v. *Smith,* 62 Pa. St. 47, are cases where the party at fault was a common carrier. This last case, cited in 3 Am. & Eng. Enc. (2 Ed.) 750, for the same proposition, may be readily distinguished. The defendant there was a gratuitous bailee, and only liable for gross negligence, which it is admitted cannot be excused by contract. The principal case apparently takes a unique position, opposed to the general rule as stated above.

BANKRUPTCY—FALSE REPRESENTATION—WAIVER OF FRAUD—In a suit upon an account the defendants pleaded a discharge in bankruptcy. It was conceded that the plaintiff had proved its debt in a court of bankruptcy and received a dividend. The plaintiff offered evidence to prove that credit was extended to the defendants because of certain false representations made to it by the defendants at the time of the sale. *Held,* that the plaintiff, though it had chosen to enter the bankrupt court and take its place with the other creditors, and had received a dividend, did not thereby waive the fraud in the purchase of the goods and stand on the contract so that the discharge in bankruptcy was a bar. *J. K. Orr Shoe Co.* v. *Upshaw & Powledge* (Ga. 1913), 79 S. E. 362.

It must now be taken as settled that a creditor is not bound to elect which remedy he will pursue against the bankrupt on a contract where the right to sue in tort also exists; nor does he waive the right to sue on a tort for a balance of his claim by accepting his dividend under a composition. *Friend* v. *Talcott,* 228 U. S. 27. The court in the principal case based its opinion on that decision. But there have been conflicting views upon this question, and many of them in very recent cases. *Tindle* v. *Birkett,* 205 U. S. 183. The question arises under Sec. 17, (a), Bankruptcy Act 1898, which provides that a discharge in bankruptcy shall not release a bankrupt from liabilities for obtaining property under false pretenses or false representations. The argument that such a creditor, after proving his contract, voting in creditors' meetings, and thus influencing their actions to that ex-

tent, should not be permitted afterwards to sue in tort for the balance due him, has been given much weight by the court in several cases. See, under Act of 1841, *Chapman* v. *Forsyth,* 2 How. 202; under the Act of 1898 before the amendment of 1903, *Crawford* v. *Burke,* 195 U. S. 176; since that amendment, *Standard Varnish Works* v. *Haydock,* 143 Fed. 318; but the holding of the principal case is now well established

BILLS AND NOTES—WANT OF FUNDS AS EXCUSE FOR FAILING TO GIVE NOTICE OF PROTEST.—Where the maker had no funds or right to draw on the drawee bank, either at the time the check was drawn or when it was presented for payment and protested, such want of funds was prima facie an excuse for want of notice of protest to him. *Gibbs* v. *Hopper,* (Ark. 1913) 160 S. W. 879.

The decision of this case is correct as far as it goes, but it stops short of what is the law upon this subject. The drawer of a check or of a bill is a party secondarily liable, so that presentment and notice of dishonor is essential to fix his conditional liability. But there is a distinction between the liability of a drawer of a bill without funds in the hands of the drawee and the drawer of a check under the same circumstances. The drawing of a bill without funds in the hands of the drawee makes the drawer only presumptively liable as a primary party, his drawing being only prima facie fraudulent, and this presumption is capable of being rebutted, so that he is entitled to notice. But where the drawer of a check has no funds in hands of drawee, the drawing is conclusively presumed to be fraudulent, he is liable as a primary party and hence not entitled to notice. *Dolph* v. *Rice,* 18 Wis. 418; *Harker* v. *Anderson,* 21 Wend. 372; *First National Bank* v. *Linn, et al,* 30 Ore. 296; *Industrial Bank* v. *Bowes,* 155 Ill. 70; *Kinyon* v. *Stanton,* 44 Wis. 471; *Morrison* v. *McCartney,* 30 Mo. 183; *Gregg* v. *George,* 16 Kan. 546; *Thornberg* v. *Emmons,* 23 W. Va. 325; *Purcell* v. *Allemono,* 22 Gratt. 743. Hence the decision of the instant case that the want of funds was only prima facie an excuse for want of notice of protest to the drawer, does not observe the above distinction, and therefore is not broad enough in its statement of the legal principles governing the facts therein adjudicated.

BOUNDARIES—DESCRIPTION—PUBLIC HIGHWAYS.—In a controversy in a a street improvement case as to appellee's right to an award, it appeared that the deed by which she acquired title described the premises as follows: "Beginning at the northwesterly corner of Walnut St. and Second Ave.; thence running westerly along said street fifty ft.; thence parallel with said avenue one hundred ft.; thence easterly parallel with said street fifty ft.; to said ave.; thence southerly along said avenue one hundred ft. to corner aforesaid and place of beginning." The granting of the award depended upon whether the deed carried title to the center of Walnut St. or only to the exterior line. *Held,* the words were explicit enough to rebut the presumption of a grant to the middle of the street, and the deed only carried title to the exterior line. *In re Parkway in the City of New York* (N. Y. 1913), 103 N. E. 508.

The precise question raised in this case is one upon which there is much